Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In re Application	)	
	)	
EZ COMMUNICATIONS, INC.	)	File No. BRH-910401C2
	)	
	)	
For Renewal of License of	)	
FM Radio Station WBZZ(FM),	)	
Pittsburgh, Pennsylvania	)	

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SUMMARY

Allegheny Communications Group, Inc. herein replies to the Opposition to its Petition to Deny renewal of license for WBZZ, Pittsburgh, Pennsylvania, filed by EZ Communications, Inc. (EZ).

EZ's position with respect to the impact on its qualifications of adverse findings in other forums is premised on the erroneous position that the primary finding is not final. In fact, a final jury verdict was reached which is now final in every respect given EZ's decision not to pursue an appeal. EZ's reliance on essentially the same arguments rejected by the local court do not obviate the need for inquiry.

EZ's Opposition establishes that it is in willful violation of the Rule restricting settlements of threatened petitions to deny. Its attempt to justify terms of a settlement designed to obstruct access by the Commission and interested parties to evidence relating to the local litigation are not credible.

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Accordingly, no factual claims in the Opposition may be treated as properly verified, unless subject to official notice.

I. Impact of Adjudications

EZ's Opposition is premised on its view that because of the pendency of appeals from the jury verdict in the litigation between itself and Elizabeth Randolph at the time of the settlement, no final adjudication occurred. This is without merit. Pursuant to the Policy Statement on Character Qualifications In Broadcast Licensing, 102 FCC 2d 1179, 59 RR 2d 801, 819-20 (1986) (Character I), the ultimate decision of a trier of fact (in this case the jury) will be considered notwithstanding the pendency of appeals. Now, however, the decision of the trier of fact is no longer subject to appeal as a result of the voluntary decision of EZ to settle the case prior to resolution of its appeal. This leaves the adjudication by the jury final in every respect. EZ cannot collaterally attack it before this agency, especially since pursuant to the policy reflected in Character I and its progeny this agency has no greater ability to stand in the shoes of the state appellate courts than it would have had to stand in the shoes of the jury. In this respect, the arguments now advanced by EZ were in all significant respects raised before the trial judge in its Motion For Post-Trial Relief dated

February 23, 1990 (Attachment No. 1 hereto). These were

review the decision of the Arbitrator and the U.S. District Judge who affirmed his ruling.

EZ's response with respect to the three rule violations alleged consists essentially of collateral attacks on the facts found by the arbitrator and the jury. The Commission clearly cannot ignore those facts based on claims by EZ that were specifically rejected twice by two forums of competent jurisdiction.

With respect to news distortion, EZ claims that the remarks at issue were not made as part of a formal newscast. This is without merit, as reflected in Character I, 59 RR 2d at 825, wherein it is stated:

> "...any type of programming, including those types of programs such as astrology programs, foreign language broadcasts, etc., could be presented in a manner which would run afoul of our existing prohibitions [redacted]

for promotional purposes the abduction of one of its announcers, knowing that was not the case. Thus, the false reports were clearly not "intended" as news, but as a station promotion. Commission policy is rather clearly designed to prevent the knowing false reporting of matters of public interest, irrespective of how they are presented or intended. Here, the jury's defamation verdict necessarily constitutes a finding that EZ broadcast false statements of fact concerning a public figure either knowing them to be false or being aware of a high probability that they were false (EZ interposes no claim that it believed the facts to be true).

The defamation verdict also clearly constitutes civil misrepresentation, which the Commission clearly indicated would be considered in appropriate circumstances in its most recent modification to the character policy. Character Qualifications, 6 FCC Rcd 3448, 69 RR2D 278, 280 (1991) (Character IV). The length of the Commission's discussion in this respect is irrelevant contrary to the suggestion at footnote 15 of the Opposition. Nor did the Commission exclude defamation from the concept of civil misrepresentation. Defamation clearly involves false representations of fact which is particularly significant in that it directly involves programming. It would be difficult to justify a conclusion that the use of a licensed facility for the

broadcast of false representations of fact is a matter of no Commission concern.

II. Abuse of Proces

Initially, it should be noted that EZ is now in willful violation of Section 73.3589 of the Rules. Thus, at Footnote 22 of the Rules, EZ refuses to submit for Commission review the settlement agreement between itself and Ms. Randolph. Its basis for this refusal is a spurious interpretation of Section 73.3589 of the Rules that, if accepted, could go far to vitiating the Rule. As construed by EZ, the Rule would apply only where there has first been both a threat to file and a demand for payment. Apparently, a petitioner could, under EZ's theory, make a threat to file but so long as it made no demand for payment, it would be free of the Rule's restrictions, an interpretation that would vitiate the Rule. EZ also asserts that no part of its settlement with Ms. Randolph was "in exchange for" her "release that dealt with the FCC". It is however, clear from p. 1-2 of the transcript of the settlement conference included in Attachment No. 8 of Allegheny's Petition that the agreement to dismiss a pending FCC complaint and refrain from filing any further complaint with the FCC was an integral part of the agreement. It is specious to contend that no part of the consideration was "in exchange for" that particular aspect of the deal. To

accept that theory would mean that an abusive party need only accompany his threat to file a petition with the FCC with a separate civil suit and then demand payment for the withdrawal of the civil suit with the non-filing of a petition thrown in as a "free" bonus. Under EZ's theory, the parties could unilaterally determine that there was no need for the Commission even to be informed that the transaction ever occurred. It is rather evident that any transaction involving the payment of money and an agreement to refrain from filing a petition must be submitted to the Commission for its independent assessment of whether the agreement complies with the Rules.

EZ's willful and unjustified refusal to comply with Section 73.3589 of the Rules would warrant dismissal of its renewal application for failure to prosecute. Even if EZ now feels compelled to come into compliance, a hearing issue would still be required to determine the circumstances surrounding its initial failure to comply even after the Rule was specifically brought to its attention. This is particularly so since EZ failed to disclose in an amendment to its instant application filed June 19, 1991 reporting the settlement that the transaction involved terms restricting Ms. Randolph in her dealings with the Commission, so that but for Allegheny's Petition the Commission would never have known of EZ's

non-compliance. Moreover, EZ has continued to resist

full disclosure by refusing to disclose the agreement

> have to get approval from Judge Musmanno who will not give approval. If somehow I'm overruled by some higher court, then understand that's not a breach of the agreement." (emphasis added).

It is thus evident that the agreement was specifically grounded on the understanding that the Judge would not give approval under any circumstances to permit testimony by Ms. Randolph in response to a subpoena from another forum. The ex post facto claim in footnote 19 of EZ's Opposition is a transparent fabrication.

EZ further argues that the restrictions were unnecessary given the wide availability of information concerning the law suit in the press and in prior filings with the Commission. This merely serves to place in question what purpose was served by any restrictions beyond an agreement by Ms. Randolph that she would not pursue any further claims against EZ. As EZ notes, the trial was public and was well publicized so that the sealing of the record did not result in removing knowledge from the general public domain.

This consideration merely serves to reinforce the fact that the restrictions imposed could have had no purpose but to obstruct prospective petitioners and the Commission. Thus, notwithstanding the general availability of information, a prospective petitioner would be unable to document in a manner competent under Section 309(d)(1) of the Act either the scope or significance of the verdict reached, which would require the actual verdict forms and jury instructions contained

in the sealed record.1/ A prospective petitioner which timed its investigation to the July 1, 1991 deadline for petitions to deny would be unable to properly document matters notwithstanding that they were generally known.2/ Thus, while the sealing of the record served no purpose in terms of removing facts from the public domain, it did serve the purpose of obstructing the ability to document those facts in a competent manner. EZ references the filing of a complaint filed by Ms. Randolph in May, 1989. The complaint had not been acted upon as of May, 1991, leaving open the possibility that it might be entertained in connection with WBZZ's instant renewal. The restrictions imposed by the settlement would obviously undermine the Commission's ability to pursue any investigation it might have deemed appropriate.

EZ further asserts that the settlement terms are customary under local court practice.3/ This is

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1/Ms. Randolph's complaint would have been of no use to a prospective petitioner since it is not publicly available.

2/It is immaterial that only Allegheny in fact filed a petition based on facts gathered prior to the settlement since EZ had no knowledge of who might be interested in pursuing the matter at the time of the settlement. Moreover, even Allegheny is obstructed from pursuing its investigation further.

3/Allegheny in fact finds it incredible that it is "customary" for Pennsylvania courts to require an individual to defy lawful process from an agency under Federal law.

irrelevant to the issue of a party's obligations as a licensee of this Commission. As emphasized in RKO General, Inc. v. FCC, 670 F. 2d 215, 50 RR 2d 821, 839 (D.C. Cir. 1981), there is a fundamental distinction

> "She has given her assurance that she will not do anything voluntarily in any way to cause you a problem with the FCC. I mean I don't know how much broader I can make it other than that." (emphasis added).

It is simply incredible to believe that the protections provided are no different than "customary" releases routinely made in any settlement.

At p. 3 of its Opposition, EZ asserts its willingness to respond to Commission inquiry concerning the lawsuit, conditioned upon permission from the Pennsylvania court. As with the claimed expectation that restrictions on Ms. Randolph's testimony would be routinely waived, this is a post hoc ratiocination of little intrinsic credibility. EZ's claims in this respect merely serve as ex post facto recognition by EZ that the restrictions it sought to impose are indefensible. Nonetheless, it is apparent that EZ still hopes that it may realize some benefit from them. Thus, its Opposition reflects no intent to seek a general modification of the restrictions to eliminate any obstructive impact on Commission proceedings. Further, EZ interposes Court permission as a condition on its willingness to respond to Commission inquiry. This is in and of itself an abusive posture inconsistent with the attitude of full disclosure the Commission must expect from its licensees. This is particularly so since, as noted above, it was evidently the understanding that the Court would never waive the confidentiality provisions

except by order of a higher Court. The condition EZ would impose is without lawful basis since the Act and Commission actions pursuant thereto clearly preempt inconsistent state requirements.

EZ at p. 12 mischaracterizes Allegheny's Petition as suggesting that the restrictions were motivated solely by the public notice of Character IV. Rather, the principal problem facing EZ was its pending renewal in general. Especially in view of EZ's failure to dispute the impropriety of the restrictions or to provide any credible explanation for them, a substantial and material question of fact must be found that they were designed to obstruct both other parties and the Commission from access to information pertinent to consideration of EZ's renewal application. Since full information is essential for the discharge of the Commission's affirmative obligation to license in the public interest, EZ's

defames not only Allegheny's counsel but also the Court staff. It constitutes scandalous matter in violation of Section 1.52 of the Rules. The allegations are wholly unsupported by any evidence (which cannot be excused by reference to an unrelated initial decision). In fact there is no evidence even that there exists any order sealing the settlement conference transcript, as reflected by the Court staff's decision to make it available, let alone that counsel acted improperly in seeking to inspect it. Moreover, alleged misconduct before a state court is clearly not a matter that would even be appropriately raised before this Commission under the character policy in the absence of an adjudication by a competent local authority. Uncovering and providing information a licensee wishes to withhold from this Commission could not arguably be alleged as an abuse of this Commission's processes. Given that EZ concedes that its comments are of no direct relevance to its Opposition, they are obviously designed only to "poison the well" for no substantive purpose, conduct clearly abusive of the Commission's processes. As stated in striking similar ad hominem attacks in Western Cities Broadcasting, Inc., FCC 91M-1683, released May 22, 1991 at footnote 1 (attached hereto as Attachment No. 2 in pertinent part along with excerpts from the transcript cited in footnote 1):

"Such personal attacks have no bearing on the questions to be resolved, and do not advance the applicant's cause. They are unprofessional, improper, and should be discontinued."

Similarly objectionable and abusive is the comment at p. 17 of the Opposition alleging that the motive of Allegheny's application is "simply...to receive a monetary pay-off." This is unsupported by any evidence and is patently absurd since the rules (Section 73.3523) do not permit any such "pay-off", except for expenses after an initial decision. EZ's pleading tactics again merely serve to demonstrate its scant regard for the integrity of the Commission's processes.

III. Conclusion

Wherefore Allegheny's Petition should be granted.

Respectfully submitted,

ALLEGHENY COMMUNICATIONS GROUP, INC.

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Date: August 19, 1991

Attachment 1

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

ELIZABETH NELSON RANDOLPH a/k/a LIZ RANDOLPH,	)	
Plaintiff,	)	
v.	)	No. GD 88-02730
DONALD JEFFERSON a/k/a BANANA DON, JAMES QUINN, and EZ COMMUNICATIONS, INC., a corporation,	)	
Defendants.	)	

MOTION FOR POST-TRIAL RELIEF

AND NOW, come Defendants, Donald Jefferson, James Quinn, and EZ Communications, Inc., by their undersigned attorneys, and move this Honorable Court for post-trial relief, on the following grounds:

I. MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

A. DEFAMATION

1. In order to hold the Defendants liable for defamation, the jury had to find that the jokes were statements of fact or that they could reasonably be understood as describing

actual facts about the Plaintiff or actual events in which she participated.

2. The uncontradicted evidence demonstrates that the jokes at issue were not statements of fact. Among the jokes at issue, the only one which conceivably could have been construed as a statement of fact was Defendant Jefferson's comment that "we know someone here who sees a psychiatrist," which neither mentioned, inferred, implied, nor identified the Plaintiff as the person who saw a psychiatrist.

3. The uncontradicted evidence also demonstrates that the jokes could not reasonably be understood as describing actual facts about the Plaintiff or actual events in which she participated.

4. As a matter of law, the jokes at issue are not capable of defamatory meaning.

5. As a matter of law, the First Amendment of the United States Constitution prohibits recovery for defamation where comments cannot reasonably be interpreted as statements of fact or actual facts about Plaintiff or actual events in which she participated.

6. The weight of the evidence demonstrates that the jokes did not damage Plaintiff's reputation. Plaintiff introduced insufficient evidence, if any, that her reputation was injured as a result of the Defendants' jokes.

7. The charge to the jury on the requirement of actual malice was seriously misleading in that the jury was led to believe that the truth or falsity of the comments in question was to be determined in the case, all to Defendants' severe prejudice.

8. Where, as here, the uncontradicted evidence demonstrates that the comments at issue are not statements of fact, the jury cannot find that the Defendants acted with actual malice.

9. The jury's verdict in awarding Plaintiff compensatory and punitive damages for defamation was contrary to the weight of the evidence.

10. Defendants asserted and preserved their objections, exceptions and grounds with respect to the issue of defamation in pretrial proceedings and during the trial by Defendants' Motions in Limine, Motion for Compulsory Nonsuit, Motion for Directed Verdict, objections, points for charge, and/or objections to the jury charge.

B. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

11. The courts of Pennsylvania do not recognize the tort of intentional infliction of emotional distress.

12. In order to hold Defendants liable for intentional infliction of emotional distress based on allegedly defamatory statements broadcast by the Defendants, the jury had to find that the jokes were statements of fact or that they could reasonably be understood as describing actual facts about the Plaintiff or actual events in which she participated.

13. The uncontradicted evidence demonstrates that the jokes at issue were not statements of fact.

14. The uncontradicted evidence also demonstrates that the jokes could not reasonably be understood as describing actual facts about the Plaintiff or actual events in which she participated.

15. As a matter of law, the jokes at issue are not capable of defamatory meaning.

16. As a matter of constitutional law, Plaintiff is not entitled to recover for intentional infliction of emotional distress based on the broadcast of allegedly defamatory statements where the statements are not statements of fact and therefore not capable of defamatory meaning; in such a case, the claim for intentional infliction of emotional distress is subsumed in the defamation claim.

17. There is no competent medical evidence to support Plaintiff's claim for intentional infliction of emotional distress. The only diagnosis supporting Plaintiff's contentions was not made until months after the lawsuit was filed, and required a change from previous diagnoses made by Plaintiff's doctors. Moreover, the diagnosis of "atypical anxiety disorder" is not recognized in the diagnostic manuals of the profession.

18. In order to hold Defendants liable for intentional infliction of emotional distress, the jury had to find that the Defendants' conduct was a substantial factor in causing Plaintiff's alleged emotional injury.

19. In order to find that the Defendants' conduct was a substantial factor in causing the Plaintiff's alleged emotional injury, the jury had to find that the injury would not have occurred absent the Defendants' conduct.

20. The weight of the evidence does not comport with the jury's finding that the Defendants' jokes were a substantial factor in causing her emotional distress. The overwhelming weight of the evidence established that several other stressors were primary factors in precipitating Plaintiff's emotional injury, that the Defendants' jokes were a minor factor, if any, and that Plaintiff would have suffered the emotional injury regardless of the Defendants' conduct. Therefore, the jokes could not have been a substantial factor in precipitating the Plaintiff's alleged emotional injury.

21. In order to hold the Defendants liable for intentional infliction of emotional distress, the jury also had to find that the Defendants' conduct was so extreme and outrageous as to go beyond all possible bounds of decency, and is regarded as atrocious and utterly intolerable in a civilized society.

22. The weight of the evidence does not comport with the jury's finding that the Defendants' conduct was so extreme and outrageous that it goes beyond all bounds of decency, and is atrocious and utterly intolerable in a civilized society.